

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DAMON D. RABB,

Plaintiff,

v.

CABRERA, *et al.*,

Defendants.

Case No. 1:23-cv-01014-KES-BAM (PC)

FINDINGS AND RECOMMENDATIONS TO
GRANT DEFENDANT’S MOTION FOR
TERMINATING SANCTIONS

(ECF No. 55)

FOURTEEN (14) DAY DEADLINE

I. Introduction

Plaintiff Damen D. Rabb (“Plaintiff”) is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action under 42 U.S.C. § 1983. Currently before the Court is Defendant’s motion for terminating sanctions, filed August 5, 2025. (ECF No. 55.) Plaintiff did not file a response or otherwise oppose Defendant’s motion, and the deadline to do so has now expired. The motion is deemed submitted. Local Rule 230(l).

II. Relevant Procedural Background

This action proceeds on Plaintiff’s first amended complaint against Defendant Cabrera for failure to protect in violation of the Eighth Amendment.

Discovery in this action opened on August 7, 2024, with a deadline to complete all discovery of April 7, 2025, and a deadline for filing all dispositive motions (other than a motion for summary judgment for failure to exhaust) of June 16, 2025. (ECF No. 39.)

1 Pursuant to the Court's February 6, 2025 order granting Defendant's motion to modify the
2 discovery and scheduling order, the deadline for completion of all discovery was extended from
3 April 7, 2025 to May 7, 2025, and the deadline for filing all dispositive motions (other than a
4 motion for summary judgment for failure to exhaust) was extended from June 16, 2025 to July
5 16, 2025. (ECF No. 43.)

6 Defendant served Plaintiff with a deposition notice on February 19, 2025. (ECF No. 55-2,
7 Declaration of Namrata Kotwani ("Kotwani Decl.") ¶ 2, Ex. A.) The deposition notice stated that
8 Plaintiff's failure to cooperate in the deposition may result in court-ordered sanctions, including
9 dismissal of the case. (*Id.* at Ex. A.) The deposition was scheduled to take place on April 2,
10 2025, at Kern Valley State Prison. (*Id.*)

11 On March 7, 2025, Plaintiff filed a motion requesting a thirty-day extension of time to
12 prepare for his deposition because he had other engagements on the original deposition date of
13 April 2, 2025, and needed additional time to gather documentation needed during the deposition
14 itself. (ECF No. 44.) The Court directed Defendant to file a response addressing whether there
15 was any opposition to Plaintiff's request, whether Plaintiff's deposition could be rescheduled to
16 another date that was amenable to both parties, and whether any further extension of the
17 discovery and dispositive motion deadlines was necessary in light of Plaintiff's request.
18 Defendant was encouraged to attempt to meet and confer with Plaintiff as necessary and
19 appropriate. (ECF No. 45.)

20 Defendant filed a response to Plaintiff's motion on March 24, 2025. (ECF No. 46.)
21 According to the response, despite Defendant's attempts to meet and confer with Plaintiff
22 regarding a mutually agreeable date, defense counsel was unable to do so because Plaintiff
23 refused to speak to Defendant's counsel. Defense counsel was advised by the Litigation
24 Coordinator at Plaintiff's institution that it is difficult to ensure Plaintiff's attendance at
25 appointments such as depositions because he refuses to come out of his cell. Defendant noted
26 that a previous action filed by Plaintiff in this Court was terminated due to Plaintiff's refusal to
27 attend or participate in a deposition. *See Rabb v. Figueroa* ("Rabb I"), Case 1:23-cv-00843-JLT-
28 SAB (E.D. Cal.). Defendant's counsel determined that Plaintiff's institution was able to

1 accommodate a deposition on May 5, 2025, the closest date to the thirty-day extension requested
2 by Plaintiff. Subject to the Court's approval, Defendant's counsel would re-notice Plaintiff's
3 deposition for that date. Defendant additionally requested an extension of the discovery and
4 dispositive motion deadlines by thirty days. (ECF No. 46.)

5 On March 25, 2025, after considering Plaintiff's motion and Defendant's non-opposition,
6 the Court found it appropriate to grant Plaintiff an extension of time to prepare for his deposition.
7 (ECF No. 47.) The Court further found that Plaintiff could not claim prejudice by Defendant's
8 selection of May 5, 2025, as the new deposition date, in light of Plaintiff's refusal to meet and
9 confer with defense counsel regarding a mutually agreeable date. The Court granted Plaintiff's
10 motion for an extension, directed that Plaintiff's deposition be re-noticed for May 5, 2025, and
11 granted Defendant's request to modify the scheduling order. The discovery deadline was
12 extended to June 6, 2025. The Court expressly warned Plaintiff that the failure to appear for or
13 participate meaningfully in his deposition may subject him to sanctions, up to and including
14 terminating sanctions. (ECF No. 47 at p. 3.)

15 On April 10, 2025, Defendant re-noticed Plaintiff's deposition for May 5, 2025, at 10:00
16 a.m. (Kotwani Decl. ¶ 3, Ex. B.)

17 On April 21, 2025, Plaintiff filed a "Motion to the Court to Request that Defendant, and
18 CDCR at Kern Valley State Prison be Ordered to Provide an Escort for Plaintiff's Deposition
19 Date of May 5, 2025." (ECF No. 49.) Plaintiff requested that the Court take notice that he was
20 under immediate threat at Kern Valley State Prison ("KVSP"), that such a threat upon his life
21 existed currently, and that the Court order KVSP to designate a correctional officer(s) escort for
22 Plaintiff. Plaintiff alleged that KVSP lied about providing an escort in *Rabb I*, which ultimately
23 resulted in dismissal of that action. Plaintiff stated that CDCR defendants were relying on
24 Plaintiff to not exit his cell for scheduled deposition(s) and court proceedings, in order for them to
25 prevail, as it then appears that Plaintiff is not cooperating with his obligations in this and other
26 pending actions. Plaintiff therefore requested that an order be entered requiring KVSP-CDCR to
27 provide an escort to and from the scheduled video conference to ensure Plaintiff's safety. (*Id.*)

28 The Court found it appropriate for Defendant to file a response to Plaintiff's motion and

1 directed Defendant to address whether Plaintiff had previously raised with defense counsel any
2 active concerns for his safety and KVSP's policy or practice regarding whether inmates are
3 escorted by correctional staff to and from scheduled video appearances or whether inmates travel
4 to and from video appearances unaccompanied by correctional staff. (ECF No. 50.)

5 On April 28, 2025, Defendant filed a response. (ECF No. 51.) Defense counsel declared
6 that Plaintiff had not previously raised any specific safety concerns with defense counsel, and if
7 Plaintiff had reported safety concerns about staff or other incarcerated persons to building staff,
8 facility supervisors, he would be housed in a Restricted Housing Unit ("RHU") pending transfer
9 to safer housing either within the same institution or another institution. Further, under KVSP's
10 current practice, at the time of Plaintiff's deposition the control booth officer would open the cell
11 door for Plaintiff to exit, Plaintiff would walk unaccompanied to a metal detector at the housing
12 unit exit and walk across the housing unit yard. Staff controlling the observation tower would
13 then open a gate, allowing Plaintiff to access the patio area. Plaintiff would again pass through a
14 metal detector and receive a pat down search. Although Plaintiff would not have an escort up to
15 the patio area, he would be observed by correctional staff through this journey, especially the
16 control booth staff and the staff in the observation tower. A correctional officer would then escort
17 Plaintiff from the patio area to the Board of Parole Hearing ("BPH") area designated for video
18 appearances. After the deposition ended, Plaintiff would be escorted back to the patio area. (*Id.*)

19 However, in light of Plaintiff's motion, though unsubstantiated by any evidence of a
20 threat, KVSP's Litigation Coordinator would request that a correctional officer escort Plaintiff
21 from his cell to the building exit. (ECF No. 51-2 ("Hamilton Decl."), ¶ 13.) It was noted that an
22 escort might not be available if the institution faced exigent circumstances threatening the safety
23 of staff and other incarcerated persons requiring backup support from correctional officers
24 assigned to other duties. (*Id.* ¶ 14.) Defense counsel also asserted that Plaintiff was previously
25 provided an escort for his deposition in *Rabb I*, but nevertheless Plaintiff refused to appear for the
26 deposition. (ECF No. 51-1, Ex. A.)

27 On May 9, 2025, based on Defendant's assertion that Plaintiff would be provided an
28 escort for his deposition, barring exigent circumstances, and the fact that Plaintiff's deposition

1 was noticed for May 5, 2025, the Court found Plaintiff's motion for an escort was moot and
2 denied the motion. The Court warned Plaintiff that if he nevertheless failed to appear for or
3 participate meaningfully in his May 5, 2025 deposition, then he may be subject to sanctions, up to
4 and including terminating sanctions, pursuant to Federal Rule of Civil Procedure 30(d)(2). (ECF
5 No. 52.)

6 On May 16, 2025, Plaintiff filed a "Notice to the court regarding deposition," which was
7 dated May 11, 2025. (ECF No. 53.) Plaintiff acknowledges that he was ordered to appear for a
8 deposition and did not. He reportedly found the parameters detailed for the Court were "not
9 sufficient, in that, no security or escort would have been provided during more than half the walk
10 from housing unit to BPH would have been without the escort of staff." (*Id.*) Plaintiff further
11 states that he "elect[s] to refrain from the terms provided by: Dustin Hamilton – KVSP/CDCR
12 Litigation Coordinator, as set forth in his/her declaration to this court." (*Id.*) Plaintiff further
13 states that the Court "has yet to render a disposition in Plaintiff's motion for an escort by KVSP
14 personnel." (*Id.*) Plaintiff claims that his "decision to not attend my deposition comes only as a
15 measure to preserve my safety." (*Id.*)

16 On August 5, 2025, Defendant filed the instant motion for terminating sanctions. (ECF
17 No. 55.) Plaintiff did not file a response.

18 **III. Defendant's Motion for Terminating Sanctions**

19 Defendant moves for terminating sanctions for Plaintiff's failure to attend and cooperate
20 in his properly noticed deposition on May 5, 2025, and his refusal to comply with this Court's
21 order compelling his deposition testimony. Defendant brings the motion under Federal Rule of
22 Civil Procedure 37 and Rule 41 on the grounds that Plaintiff's repeated failure to attend his own
23 deposition, and to follow court orders, warrants the imposition of terminating sanctions. (ECF
24 No. 55.)

25 In the motion, Defendant reports that on May 5, 2025, the date of Plaintiff's re-noticed
26 deposition, KVSP's Litigation Coordinator reminded staff at Plaintiff's housing unit to provide
27 him with an escort from his cell to the deposition at 9:20 a.m. (ECF No. 55-3, Declaration of
28 Dustin Hamilton ("Hamilton Decl.") ¶ 4, Ex. E.) Before the deposition, defense counsel called

1 the Litigation Coordinator to confirm whether housing staff had advised Plaintiff that they would
 2 be providing an escort from his cell to the designated deposition area. (*Id.* ¶ 5.) The Litigation
 3 Coordinator confirmed that staff had informed Plaintiff about the escort. (*Id.*) Shortly thereafter,
 4 the litigation coordinator informed defense counsel that Plaintiff had refused to exit his cell and
 5 appear for the deposition. (*Id.* ¶ 6, Ex. E.) Defense counsel appeared by video for Plaintiff's
 6 deposition as scheduled at 10:00 a.m. (Kotwani Decl. ¶ 6.) Plaintiff did not appear for his
 7 deposition. (*Id.*) The officer present in the designated deposition area confirmed that Plaintiff
 8 was refusing to appear. (*Id.*) Defense counsel therefore requested the court reporter prepare a
 9 certificate of non-appearance. (*Id.*, Ex. D.) At 10:51 a.m., the Litigation Coordinator confirmed
 10 that Plaintiff had refused to appear despite being advised that a personal escort would bring him
 11 to the designated deposition area and back to his cell. (*Id.* ¶ 7, Ex. F.)

12 Plaintiff did not file any opposition or response to Defendant's motion.

13 **A. Legal Standard**

14 The Federal Rules of Civil Procedure specifically contemplate dismissal as a sanction for
 15 failing to comply with the rules of discovery or a court order. Rule 37 permits a court to dismiss
 16 an action or proceeding if a party fails to obey a discovery order or refuses to attend a properly
 17 noticed deposition. Fed. R. Civ. P. Civ. P. 37(d)(1)(A)(i), 37(b)(2)(A)(v). "Dismissal, however,
 18 is authorized only in 'extreme circumstances' and only where the violation is 'due to willfulness,
 19 bad faith, or fault of the party.'" *In re Exxon Valdez*, 102 F.3d 429, 432 (9th Cir. 1996) (citation
 20 omitted). Similarly, Rule 41(b) also provides for dismissal of an action for failure to comply with
 21 the rules of civil procedure or a court order. Fed. R. Civ. P. 41(b).

22 Additionally, Local Rule 110 provides that the failure of a party to comply with any local
 23 rule or order of the court may result in the imposition of "any and all sanctions authorized by
 24 statute or Rule or within the inherent power of the Court." District courts have the inherent
 25 power to control their dockets and "[i]n the exercise of that power they may impose sanctions
 26 including, where appropriate ... dismissal." *Thompson v. Hous. Auth.*, 782 F.2d 829, 831 (9th Cir.
 27 1986). Terminating sanctions may be warranted where "discovery violations threaten to interfere
 28 with the rightful decision of the case." *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*,

1 482 F.3d 1091, 1097 (9th Cir. 2007).

2 **A. The Court Finds that Plaintiff has Acted Willfully and in Bad Faith**

3 Plaintiff's pro se status does not excuse intentional non-compliance with the Federal Rules
4 of Civil Procedure or court orders. *See Lindstedt v. City of Granby*, 238 F.3d 933, 937 (8th Cir.
5 2000) (affirming sanction of dismissal, holding that "[a] pro se litigant is bound by the litigation
6 rules as is a lawyer. . ."). In the instant action, Plaintiff has been aware since the Court's
7 issuance of the initial discovery and scheduling order that he would be required to appear and
8 cooperate in a deposition. (ECF No. 39.) Plaintiff also has been warned multiple times that if he
9 failed to appear for or participate meaningfully in his deposition, then he may be subject to
10 sanctions, including terminating sanctions. (*See* ECF Nos. 47, 52, 55-2, Ex. A.)

11 Defendant has noticed Plaintiff's deposition twice in this action and each time Plaintiff
12 has either delayed or refused to cooperate. The first time Defendant noticed Plaintiff's
13 deposition, Plaintiff requested a thirty-day extension of time because he had other engagements
14 on the original deposition date, and he needed additional time to gather documentation for the
15 deposition. (ECF No. 44.) The Court granted the continuance, directed that the deposition be re-
16 noticed for May 5, 2025, and expressly warned Plaintiff that if he failed to appear for or
17 participate meaningfully in his deposition then he may be subject to sanctions, including
18 terminating sanctions. (ECF No. 47 at 3.)

19 The second time Defendant noticed Plaintiff's deposition, Plaintiff requested that KVSP
20 be ordered to provide an escort to and from the deposition to ensure Plaintiff's safety. (ECF No.
21 49.) Even after KVSP informed Plaintiff that he would be provided an escort from his cell to the
22 designated deposition area, as he had requested, Plaintiff refused to exit his cell and refused to
23 appear as his deposition. (Hamilton Decl. ¶¶ 5-7.) Plaintiff claims that he found the parameters
24 previously detailed for the Court were not sufficient because no security or escort would have
25 been provided during more than half the walk from the housing unit to BPH. (ECF No. 53.)
26 Plaintiff's excuse is not supported by the record, as KVSP staff informed Plaintiff on the day of
27 his re-noticed deposition that they were going to give him a personal escort up to BPH. (ECF No.
28 55-3, Ex. F to Hamilton Decl.) Plaintiff still refused to exit his cell. (*Id.*) There was no objective

1 reasonable basis to conclude that Plaintiff was justified in not appearing for his deposition.
 2 “[D]isobedient conduct not shown to be outside the party’s control is by itself sufficient to
 3 establish willfulness, bad faith, or fault.” *Sanchez v. Rodriguez*, 298 F.R.D. 460, 463 (C.D. Cal.
 4 2014). Plaintiff acknowledges that he was ordered to appear for a deposition and did not. (ECF
 5 No. 53.)

6 Based on the foregoing, the Court finds that Plaintiff’s conduct constitutes willful
 7 disregard for the Court’s orders, and bad faith in an effort to avoid being deposed.¹ The Court
 8 now turns to the issue of whether terminating sanctions are appropriate.

9 **B. Terminating Sanctions are Appropriate**

10 The Court must consider five factors in deciding whether terminating sanctions are
 11 warranted: (1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to
 12 manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring
 13 disposition of cases on their merits; and (5) the availability of less drastic alternatives. *Ferdik v.*
 14 *Bonzelet*, 963 F.2d 1258, 1260–61 (9th Cir. 1992); *Henderson v. Duncan*, 779 F.2d 1421, 1423
 15 (9th Cir. 1986); *see also Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002).

16 The public’s interest in expeditious resolution of litigation weighs in favor of dismissal.
 17 The Ninth Circuit has explained that “[t]he public’s interest in expeditious resolution of litigation
 18 always favors dismissal.” *Pagtalunan*, 291 F.3d at 642 (citation omitted). Here, Plaintiff’s
 19 conduct has delayed the proceedings and has deprived Defendant of his right to take Plaintiff’s
 20 deposition. As the docket reflects, Plaintiff first sought to postpone his deposition, then sought a
 21 personal escort, and then ultimately refused to attend his deposition despite being provided with
 22 the requested escort. Plaintiff’s conduct has delayed discovery in this action and unnecessarily
 23 multiplied these proceedings. Plaintiff also has failed to comply with the Court’s orders to attend
 24 and participate meaningfully in his deposition. Thus, the first factor weighs in favor of dismissal
 25 of this action.

26
 27 ¹ This is not the first time that Plaintiff’s failure to attend his deposition has been found to be
 28 willful conduct. In *Rabb I*, the court found Plaintiff’s failure to appear for his deposition to be
 willful justifying terminating sanctions. (Case No. 1:23-cv-00843-JLT-SAB, ECF No. 94.)

1 The second factor focuses on whether a particular case has “consumed large amounts of [a
2 district] court’s valuable time that it could have devoted to other major and serious criminal and
3 civil cases on its docket.” *See Ferdik*, 963 F.2d at 1261. (“It is incumbent upon us to preserve
4 the district courts’ power to manage their dockets without being subject to the endless vexatious
5 noncompliance of litigants like *Ferdik*.”). As detailed in this order, the Court has devoted
6 substantial time and resources addressing Plaintiff’s required attendance at his deposition and his
7 related motions. Because of Plaintiff’s conduct, the Court also is required to devote substantial
8 time to assess whether dismissal is appropriate. Plaintiff’s conduct has diverted the Court from
9 other cases and has required the Court to expend its limited resources addressing his motions and
10 his failure to attend his deposition. The Court cannot effectively manage its docket if Plaintiff
11 fails to comply with court orders and fails to attend his deposition. Thus, the second factor also
12 weighs in favor of dismissal.

13 The third factor—prejudice to Defendant—also favors dismissal. “A defendant suffers
14 prejudice if the plaintiff’s actions impair the defendant’s ability to go to trial or threaten to
15 interfere with the rightful decision of the case.” *In re Phenylpropanolamine (PPA) Prods. Liab.*
16 *Litig.*, 460 F.3d 1217, 1227 (9th Cir.2006) (quoting *Adriana Int’l Corp. v. Thuerren*, 913 F.2d
17 1406, 1412 (9th Cir.1990)). Defendant has been unable to take Plaintiff’s deposition to discern
18 the factual basis for the claims against him, investigate Plaintiff’s claimed injuries, and uncover
19 the facts that underlie potential defenses. Defendant also has been required to expend time and
20 resources responding to Plaintiff’s motions related to his deposition which have unduly delayed
21 the proceedings in this case.

22 The fourth factor usually weighs against dismissal because public policy favors
23 disposition on the merits. *In re PPA*, 460 F.3d at 1228; *Pagtalunan*, 291 F.3d at 643. However,
24 “this factor lends little support to a party whose responsibility it is to move a case toward
25 disposition on the merits but whose conduct impedes progress in that direction,” which is the case
26 here. *In re PPA*, 460 F.3d at 1228 (citation omitted).

27 No lesser sanction is warranted. A district court must consider the impact of a sanction
28 and whether a less severe sanction would adequately address a party’s failure to engage in the

1 discovery process. *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 131–32 (9th Cir. 1987). The
2 Court has considered lesser sanctions, but no lesser sanction is warranted. Evidentiary sanctions
3 would be ineffective, as Plaintiff would still be able to testify to information that he withheld
4 from Defendant at the deposition and the Court would have no practical way of excluding such
5 testimony. Monetary sanctions are also ineffective because of Plaintiff’s *in forma pauperis*
6 status. He would likely be unable to pay any monetary sanctions. Additionally, the Court warned
7 Plaintiff about the consequences of noncompliance, but Plaintiff’s conduct has indicated no intent
8 to comply with the Court’s orders or to appear for a deposition. The Court finds that there are no
9 other, lesser sanctions that would be satisfactory or effective.

10 Further, the Court’s warning to a party that failure to obey the Court’s order will result in
11 dismissal satisfies the “considerations of the alternatives” requirement. *Ferdik*, 963 F.2d at 1262;
12 *Malone*, 833 F.2d at 132–33; *Henderson*, 779 F.2d at 1424. The Court’s orders expressly warned
13 Plaintiff that if he failed to appear for his deposition, then he may be subject to sanctions,
14 including terminating sanctions. (ECF No. 47 at 43 [**“Plaintiff is warned that if he fails to**
15 **appear for or participate meaningfully in his deposition, he may be subject to sanctions, up**
16 **to and including terminating sanctions.”**]; *see also* ECF No. 52.) Thus, Plaintiff had adequate
17 warning that dismissal could result from his noncompliance.

18 IV. Conclusion and Recommendation

19 For the reasons set forth above, the Court finds that terminating sanctions are justified and
20 HEREBY RECOMMENDS that:

- 21 1. Defendant’s motion for terminating sanctions, (ECF No. 55), be GRANTED.
- 22 2. This action be DISMISSED with prejudice.

23 These Findings and Recommendations will be submitted to the United States District
24 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
25 **fourteen (14) days** after being served with these Findings and Recommendations, the parties may
26 file written objections with the court. The document should be captioned “Objections to
27 Magistrate Judge’s Findings and Recommendations.” **Objections, if any, shall not exceed**
28 **fifteen (15) pages or include exhibits. Exhibits may be referenced by document and page**

1 **number if already in the record before the Court. Any pages filed in excess of the 15-page**
2 **limit may not be considered.** The parties are advised that failure to file objections within the
3 specified time may result in the waiver of the “right to challenge the magistrate’s factual
4 findings” on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 838–39 (9th Cir. 2014) (citing *Baxter*
5 *v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

6
7 IT IS SO ORDERED.

8 Dated: October 8, 2025

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE